Nos. 20799, 20800, 20801

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MIRRO-DYNAMICS CORPORATION,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Petition for Rehearing and Suggestion for Rehearing by the Court En Banc.

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Mirro-Dynamics Corporation, pursuant to Rule 23 of this Court, respectfully petitions for a rehearing of the decision of this Court entered on March 10, 1967, and respectfully suggests that, in the event that rehearing is denied by the panel that rendered the decision, this petition be considered by the Court en banc.

After spelling out the contentions of the taxpayer and the Government, this Court affirms the granting of the Government's Motion for Summary Judgment in its one-paragraph conclusion [Op. 3] that the "difficulty which taxpayer faces here, and which it has not overcome, is not in showing . . ., but in showing. . . ." This taxpayer, which had hoped to prove its case to a jury and show what it intended to do and what it did do and whether it did have customers, has been foreclosed from having its day in Court to make any show-

ing at all. There is no doubt that if the taxpayer were to reduce all of the testimony it proposed to introduce at a trial to affidavit form in support of a motion for summary judgment on the part of the taxpayer, the Government would object thereto on the grounds that it would be precluded from cross-examining the taxpayer's witnesses. For this reason, the taxpayer could not, without a trial, "show" what the Court's opinion describes as taxpayer's difficulty. This was pointed up at the oral argument when Judge Jones asked if the taxpayer did have any customers. The response, with which Government counsel agreed, was that there was nothing in the record on the point as to the extent of any customer activity. There is *nothing* in the record to indicate that the taxpayer had *no* customers, which the Court's opinion apparently assumes.

This appeal cannot be properly disposed of without the Court's consideration of the specifications of error relating to the granting of the motion for summary judgment. If there are no genuine triable issues of fact in this case, then the myriad cases heard by this Court relating to the issue of whether a taxpayer is a dealer in real property turn only on legal rather than factual questions. It is submitted that the criteria are the same in both types of cases.

What was plaintiff's INTENT in the acquisition and disposition of securities? What was the nature of plaintiff's everyday business operation? What activities did plaintiff engage in in pursuit of its securities business? These are questions of fact which may not be disposed of by summary judgment.

Assuming for the sake of argument that this Court is willing to premise its decision on legislative history

which the Supreme Court has held should not be resorted to to create an ambiguity, as discussed in Appellant's Reply Brief, p. 7, the result is a *sub silentio* overruling of this Court's decision in *Chinook Inv. Co.*, 136 F. 2d 984. There is nothing in the statutory definition of a capital asset differentiating between securities and real property. The legislative history should not be used to do so where the statute is clear and not ambiguous. The result here urged is consistent with the Government's position prior to 1951 (according to the Government's brief, fn. 8).

Whether appellant may be denied its right to a trial by jury and its day in Court for the presentation of testimony and other evidence in this case involving over one-half million dollars is a question of such public importance that it should be considered by the Court en banc. It is submitted that the result here should have been consistent with that of Judge Barnes in *New and Used Auto Sales v. Hansen*, 245 F. 2d 951, 952, 953 (9th Cir. 1957), vitiating the judgments below, as the lower court failed to find that there were no genuine triable issues of material fact.

Wherefore Appellant prays that this Honorable Court grant this petition for rehearing, with oral argument of the case if deemed advisable by the Court.

Respectfully submitted,

WYSHAK & WYSHAK,
ROBERT H. WYSHAK,
LILLIAN W. WYSHAK,
Attorneys for Petitioner-Appellant.

Dated: April 7, 1967.

Certificate of Counsel.

I certify that in my judgment this petition for rehearing and suggestion for rehearing by the Court en banc is well founded and is not interposed for delay.

ROBERT H. WYSHAK